IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33798

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 517**
	)	
Plaintiff-Respondent,	)	**Filed: June 20, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
MARTIN BETTWIESER,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. D. Duff McKee, District Judge. Hon. Michael J. Reardon, Magistrate.

Memorandum decision of the district court on intermediate appeal from the magistrate, affirming conviction for speeding, affirmed.

Martin Bettwieser, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Thomas Tharp, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Martin Bettwieser appeals from the district court's memorandum decision affirming the order of the magistrate finding him guilty of speeding. We affirm.

I.
FACTS AND PROCEDURE

On July 12, 2005, Boise City police officer Eric Simunich observed Bettwieser operating a truck and overtaking another vehicle which the officer's radar reported was traveling at 48 to 49 mph in a 40 mph zone. Visually estimating that Bettwieser was traveling 55 mph, the officer confirmed the speed on his radar. After pulling him over, Officer Simunich issued an infraction citation to Bettwieser for exceeding the posted speed limit in violation of I.C. § 49-654(2).

Bettwieser entered a not guilty plea, and a bench trial was scheduled. On September 1, 2005, he served a discovery request, to which the state responded on September 22. The state also filed a supplemental discovery response on October 4.

On October 28, ten days prior to trial, Bettwieser filed a motion to dismiss, alleging the state had failed to file a timely response to discovery. On the day trial was to commence, the magistrate considered and denied Bettwieser's motion.

At trial, only Officer Simunich testified and was subsequently cross-examined by Bettwieser. After closing arguments by both parties, the court found Bettwieser guilty of the infraction as charged, noted the conviction on the citation, and assessed the statutory fine of $62.50 in addition to court costs.

On appeal to the district court, Bettwieser asserted that the magistrate erred by denying his motion to dismiss and alleging there was insufficient evidence to support his conviction. The district court disagreed, and in a memorandum decision, affirmed the magistrate's order finding him guilty of speeding. Bettwieser repeatedly requested a rehearing, which the district court denied. He now appeals.

II.
ANALYSIS

When the district court has acted in its appellate capacity, rather than directly reviewing the magistrate court's decision independently of, but with due regard for, the district court's decision, we instead directly review the district court's decision. *Losser v. Bradstreet,* __ Idaho ___, 183 P.3d 758 (2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow there from and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.; Nicholls v. Blaser,* 102 Idaho 559, 633 P.2d 1137 (1981).

A. Motion to Dismiss

Bettwieser contends the magistrate erred in failing to grant his motion to dismiss the charges against him on the basis that the state filed its response to his discovery request several days late. He also asserts that the state's discovery responses were incomplete because they did

not include the criminal history of the state's sole witness, any exculpatory evidence, or "certification documents on the radar and his training and ability."

Idaho Criminal Rule 16(e)(2) states that the failure to file and serve a response or object to a discovery request within fourteen days shall constitute a waiver and shall be grounds for sanctions by the court absent a showing of good cause or excusable neglect. The choice of an appropriate sanction, or whether to impose a sanction at all, for a party's failure to comply with a discovery request or order is within the discretion of the trial court. *State v. Hawkins*, 131 Idaho 396, 405, 958 P.2d 22, 31 (Ct. App. 1998). When imposing discovery sanctions, the court should balance the equities and make the punishment fit the crime. *State v. Anderson*, 145 Idaho 99, 105, 175 P.3d 788, 794 (2008). The judge should balance the culpability of the disobedient party against the resulting prejudice to the innocent party. *Id*. The trial court's exercise of that discretion is beyond the purview of a reviewing court unless it has been clearly abused. *State v. Stradley*, 127 Idaho 203, 208, 899 P.2d 416, 421 (1995).

A party seeking the exclusion of evidence as a sanction for a discovery violation must establish prejudice. *Roe v. Doe*, 129 Idaho 663, 668, 931 P.2d 657, 662 (Ct. App. 1996). When an issue of late disclosure of prosecution evidence is presented, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving a fair trial. *State v. Johnson*, 132 Idaho 726, 728, 979 P.2d 128, 130 (Ct. App. 1999). Prejudice is not demonstrated by a mere claim that additional investigation or testing could have been conducted; rather, a defendant must show there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceedings would have been different. *Hawkins*, 131 Idaho at 405, 958 P.2d at 31.

Bettwieser does not identify any actual prejudice he suffered due to the untimeliness of the disclosure aside from a bare assertion that he could have conducted additional investigation had he received the requested discovery earlier. However, such a generalized proposition is inadequate to show that he actually suffered prejudice due to the relatively short delay. *See Hawkins*, 131 Idaho at 405, 958 P.2d at 31. In reality, Bettwieser received the discovery more than one and one-half months prior to the commencement of trial--a significant period of time given the nature of the case. And he has not shown how his presentation of evidence or argument to the court at trial would have differed in any material respect or how he would have been able to conduct a more effective cross-examination of the only witness at trial, Officer

Simunich, had he received the discovery a few days earlier. *See State v. Barton*, 119 Idaho 114, 118, 803 P.2d 1020, 1024 (Ct. App. 1991) (finding no abuse of discretion in denial of motion to dismiss for a late disclosure of court-ordered discovery where the discovery information was utilized, the defendant had the opportunity to review the information prior to its use, and there was no showing that anything would have been conducted differently had the disclosure been timely).

Also, as the state points out, while Bettwieser was not required to move to compel the production of discovery, his failure to do so is a relevant factor in our determination of whether he was actually prejudiced by the state's tardy response. *See State v. Matthews*, 124 Idaho 806, 812, 864 P.2d 644, 650 (Ct. App. 1993) (finding no abuse of discretion in the district court's decision not to exclude the state's expert from testifying, despite late disclosure of the expert's opinion, in light of the defendant's failure to seek an order compelling discovery). If Bettwieser had believed the state's late response hampered his defense, he still had more than a month to bring the matter to the court's attention and seek to continue the trial, instead of waiting until a week prior to trial and filing a motion to dismiss.

Bettwieser also has not shown how the response to his discovery request was incomplete or inadequate in a manner requiring the dismissal of the charges against him. First, we agree with the district court that his discovery requests were adequately responded to by the state, to the extent that they were pertinent to the issues of the case.[1] The requests that the state did not reply to were either inappropriate for discovery (inquiries asking the state to list the material facts of the case and to indicate why the defendant acted as he did and whether there were any bases to dismiss the case) or because they simply did not apply to the case, as was the case with Bettwieser's request for the identity of or statements by other witnesses (of which there were none) and exculpatory evidence possessed by the state (of which the state was unaware). Furthermore, even if the state's response to his discovery requests was deficient in some manner, Bettwieser has not pointed to any specific prejudice he suffered from this allegedly incomplete disclosure by the state--nor do we ascertain any after a review of the record.

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[1] Specifically, Bettwieser was provided with the identity of the officer (the state's only witness), a copy of the citation and the officer's notes (the only documents in the case file), an indication that there was an audio tape and instructions on how to arrange to listen to the tape.

In sum, there is no evidence that Bettwieser was prejudiced by the state's delayed answers to his discovery requests or by any deficiency in the answers. As such, the district court was correct in affirming the magistrate's denial of Bettwieser's motion to dismiss.

B. Sufficiency of the Evidence

Bettwieser also contends there was insufficient credible evidence to support his conviction, there remained reasonable doubt of his commission of the citable offense, and the state did not satisfy its burden at trial. We interpret this as a sufficiency of the evidence argument and analyze it as such.

Appellate review of the sufficiency of the evidence is limited in scope. A judgment of conviction will not be overturned on appeal where there is substantial and competent evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

At trial, Officer Simunich, an experienced law enforcement officer trained in visual detection of speed and radar operation, testified that he visually observed Bettwieser's vehicle traveling 55 mph in a 40 mph zone and confirmed that estimation with his radar. He testified that his radar had been pre-calibrated prior to his going on duty and that it was operating correctly. The speed was again confirmed by the distance it took him to catch up with the truck when he reversed his direction in pursuit of Bettwieser. He indicated that Bettwieser was identified as the person operating the vehicle by his presentation of an Idaho driver's license. Bettwieser offered no evidence rebutting Officer Simunich's version of the events. Upon this record, we conclude there was substantial and competent evidence upon which a reasonable trier of fact could find Bettwieser culpable of violating I.C. § 49-654(2) by driving approximately 15 mph over the speed limit.

C. Memorandum Decision of District Court

Finally, Bettwieser asserts that the district court erred in its memorandum decision by making findings of fact not made by the magistrate, failing to make conclusions of law, and failing to apply the appropriate standard of review. Thus, he argues, we should disregard the district court's written decision.

Bettwieser's contentions in this regard have no merit. We are convinced after a review of the memorandum decision of the district court that it conforms to the applicable rules in regard to the finding of facts and standard of review. Furthermore, the court clearly makes reviewable conclusions of law--first that the magistrate did not err in rejecting Bettwieser's motion to dismiss as a discovery sanction and also that there was sufficient evidence to support Bettwieser's conviction.

III.
CONCLUSION

The district court did not err in affirming the magistrate's denial of Bettwieser's motion to dismiss. In addition, there was sufficient evidence for a reasonable trier of fact to determine that he did act in violation of I.C. § 49-654(2). Accordingly, the memorandum decision of the district court affirming the magistrate's conviction of Bettwieser for speeding is affirmed.

Judge LANSING and Judge PERRY **CONCUR**.